No. 79-244

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

vs.

JOHN M. SALVUCCI, JR., and JOSEPH G. ZACKULAR

BRIEF IN OPPOSITION TO GOVERNMENT'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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CITATIONS

REASONS FOR DENYING THE PETITION

The government in the present case is asking the Court to reassess the validity of the "automatic standing" rule enunciated by this Court in Jones v. United States, 362 U.S. 257 (1960). This case is not an appropriate vehicle for that reassessment since the respondents were charged with crimes that have as an essential element proof of possession of the evidence seized at the time of the contested search and seizure. What Mr. Justice Frankfurter said in Jones, supra, rings true today:

> ...To hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. Jones v. United States, 362 U.S. 257, 261.

The government's argument that Mr. Zackular is vicariously asserting the Fourth Amendment rights of his mother is completely without merit. Alderman v. United States, 394 U.S. 165 (1969). This argument would be true if Mr. äckular was not charged with a crime that includes possession as an essential element. Indeed, the Court's opinion in Rakas v. Illinois, No. 77-5781 (December 5, 1978) supports this contention. There the defendants, indicted for the crime of armed robbery, moved to suppress a shotgun and ammunition found inside a car owned and operated by another party. At the time of the search the defendants were passengers in the car. Finding that the defendants had no legitimate expectation of privacy in the vehicle, the Court ruled that the defendants lacked standing to assert a violation of their Fourth Amendment rights. The Court in Brown v. United States, 411 U.S. 223 (1973) made a similar ruling after finding that the case against the defendants did not depend on possession of the seized evidence at the time of the contested search and seizure.

The distinguishing feature of this case is the crime with which the defendant is charged. Zackular is charged with unlawful possession of stolen mail, in violation of 18 U.S.C. 1708. The very nature of this indictment provides him with "automatic standing" to assert a violation of his Fourth Amendment rights. Jones v. United States, supra. The opinions of the Court in Brown v. United States, supra, and Rakas v. Illinois, supra, are not inapposite. It is still true that the Fourth Amendment protects people ---and not simply "areas" --- against unreasonable searches and seizures. Katz v. United States, 389 U.S. 347 (1967); Warden v. Hayden, 387 U.S. 294 (1967); United States v. Miller, 425 U.S. 435 (1976). Accordingly, the respondent suggests that the government is wrong when it asserts that Mr. Zackular's Fourth Amendment rights were not violated by the challenged search. (Government's petition, p. 8) On the contrary, he is, in a very real sense, "a person aggrieved by an unlawful search and seizure". See Rule 41(e) of the Federal Rules of Criminal Procedure. Rule 41 (e) should not be applied to allow the Government to deprive the defendant of standing to bring a motion to suppress by framing the indictment in general terms, while prosecuting for possession. The Court in Jones v. United States, supra, was cognizant of the prosecutorial self-contradiction and ruled accordingly. The doctrine clearly must continue, otherwise every prosecutor would have an advantage in asserting that the defendant did not have possession to justify Fourth Amendment protection, but did have sufficient possession to justify a conviction.

Another factor that has to be taken into consideration in the instant case is the fact that the respondent was certainly a "target" of the state police investigation. See LaFave, Search and Seizure, Volume III, p. 595 et seq. In United States v. Jeffers, 342 U.S. 48 (1951) this Court was confronted with a similar problem. The Court, however, ruled in favor of granting the defendant standing even though the police discovered narcotics in a hotel room rented by two aunts of the defendant. With respect to defendant's standing the Court said:

> ...that the search did not invade respondent's privacy and that he, therefore, lacked the necessary standing to suppress the evidence seized. The significant act, it says, is the seizure of the goods of the respondent without a warrant. We do not believe the events are so easily isolable. Rather they are bound together by one sole purpose -- to locate and seize the narcotics of respondent. The search and seizure are, therefore, incapable of being united. To hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principie which was designed to protect a fundamental right.

Accordingly, in the instant case, the defendant clearly was the target of the search and seizure at his mother's house in Melrose, Massachusetts. The fact that he was not present at the time, and the additional, more important fact that he was charged with a crime that had proof of possession as an essential element militate in favor of automatic standing. In accord with this view are United States v. Alewelt, 532 F. 2d 1165 (7th Cir. 1976); United States v. Kelly, 529 F. 2d 1365 (8th Cir. 1976); United States v. Britt, 508 F. 2d 1052 (5th Cir. 1975); Binkiewicz v. United States, 281 F. Supp. 233 (D. Mass. 1968).

The instant case does not offer the Court the chance to resolve any problems that the doctrine of "automatic standing" may have caused. Even though the respondent had no actual standing, as correctly pointed out by the Court of Appeals, the nature of the indictment and the subsequent action of the state police and the government confer automatic standing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT, JOHN M. SALVUCCI

The respondent, John M. Salvucci, Jr., accepts the statement and question as presented by the government.

Reasons For Not Granting The Petition

In Jones v. United States, 362 U.S. 257 (1960) this Court gave automatic standing to a defendant to contest the illegality of a search and seizure in certain situations. Among those was the situation where possession was an essential element of the crime charged. The government claims that the holding in Jones on this point has been placed in doubt by this Court's decision in Simmons v. United States, 390 U.S. 377 (1968). Notwithstanding decisions cited by the government, the respondent takes issue with this assessment of Simmons.

In Simmons this Court held that it was reversible error to admit at trial testimony given by petitioner at a hearing on a motion to suppress to establish standing. The case did not even remotely relate to or discuss the, "vice of prosecutorial self-contradiction." Indeed, the question could

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not have been presented because the items sought to be suppressed were a gun holster, a sack similar to the one used in the robbery, and several coin cards and bill wrappers from the bank which had been robbed. Possession of none of these items constituted an essential element of the crime charged.

The government says that a conflict now exists among the circuits on the issue. However, the cases cited did not involve the issue of possession at the time of the search and seizure as an essential element of the crime charged. In United States v. Grunsfeld, 558 F.2d 1231 (6th Cir. 1977), cert. denied, 434 U.S. 872, 1016 (1978), the crime charged was a narcotics conspiracy. In United States v. Delguyd, 542 F.2d 346 (6th Cir. 1976), the crime charged was destroying records to prevent seizure, and resisting government agents in their attempt to execute a search warrant. In United States v. Dye, 508 F.2d 1226 (6th Cir. 1974), cert. denied, 420 U.S. 974 (1975), the defendants were convicted of possession of whiskey, but they were not charged with possession at the time of the contested search and seizure. These are the only cases cited by the government in which the Court retreated from the automatic standing rule of Jones.

After all is said and done, it is still squarely contradictory for the government to charge a defendant with possession and at the same time claim that the defendant has no standing to complain because no right of privacy to which he is entitled has been violated. It is this contradictory position taken by the government which should be avoided. The decision in Jones accomplishes this purpose. And, no case since Jones has given any good reason why the government should be allowed to assume such a contradictory position.

In cases where possession is not an essential element of the offense charged, the respondent has no difficulty with the proposition that in order to have standing one must establish a legitimate and reasonable expectation of privacy in the premises searched or the property seized. Rakas v. Illinois, 439 U.S. 128 (1978); Brown v. United States, 411 U.S. 223 (1973). But to deny standing to complain where possession is an essential element permits the government to take advantage of an illegal act while a defendant has no recourse to combat it. It is not the same in other type cases because with or without the questioned evidence, the government still has the opportunity to prove its case. In Rakas and Simmons the physical evidence recovered by allegedly illegal means went a long way toward helping the government prove its case, but it was not necessary in order to obtain convictions of armed robbery. In Brown the actual goods were not essential to the government in proving theft from an interstate shipment, and conspiracy.

Thus, there is a real need to make the distinction this Court made in Jones. If the distinction had not been made, the government would be free in possession cases to ignore completely the Fourth Amendment with nothing to serve as a deterrent.

CONCLUSION

The petition for writ of certiorari should not be granted.

Respectfully submitted

By his attorney,

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CERTIFICATE OF SERVICE

I, Willie J. Davis, counsel for the respondent, John M. Salvucci, Jr., hereby certify that on this 1st day of November, 1979, I served the within Brief in Opposition on the government by mailing two copies thereof to the Honorable Wade H. McCree, Jr., Solicitor General of the United States, Office of the Solicitor General, Washington, D.C. 20530; and served on the respondent, Joseph G. Zackular, by mailing two copies thereof to his counsel, John C. McBride, Esquire, 366 Broadway, Everett, Massachusetts 02149.

Willie J. Davis

WILLIE J. DAVIS

Dated: November 1, 1979